No. 12,035

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM KOVELL,

Appellant,

vs.

PORTLAND TUG AND BARGE COMPANY, Claimant of Barges YF 730 and YF 618, their tackle, apparel, furniture and equipment,

Appellee.

BRIEF FOR APPELLEE.

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I.

FACTS AND ISSUES.

In heavy weather off the coast of California in June, 1947, two dumb barges, without crews, were being towed northward by the tug *Mundos*. All three vessels were owned and operated by appellee, Portland Tug and Barge Company. The tow line parted between the tug and the leading barge, and appellant, second officer of the *Mundos*, libelled the barges, claiming salvage for services which, together with services rendered by other crew members, contributed to the resumption of the tow.

The trial court, after hearing the testimony of the libelant, as well as that of the tug master and other crew members, entered a final decree dismissing the libel, for reasons which are stated in the Conclusions of Law (Apos. 17), which were drawn by the Court, and are not the usual over-statements drafted by prevailing counsel. The trial court found (Apos. 17):

> "That during all of the times mentioned herein the libelant, as a member of the crew and second mate of the M. V. "Mundos," was under the duty as such second mate of caring for the said tug boat and the said barges during the time they were on the high seas; that the said libelant was not in any manner or at all relieved of such duty as such member of the crew because of the parting of the tow rope thus separating the barges from the tug boat, but remained under a continuing duty to protect and preserve the said barges and that the things done by the said libelant in so protecting and preserving the said barges were all done in performance of the duty and obligation upon him as such crewman and second mate of the M. V. "Mundos" and in performance of his said contract of employment as such."

It is well established in maritime law that a crew member has no salvage right for services rendered to property in his care, unless his contract of employment has been terminated, either by abandonment or discharge, prior to the performance of such services. In his libel (Apos. 2, par. III), Kovell contended faintly for the abandonment theory, claiming that "* * * the Captain of the tug abandoned efforts to board the barges. * * *" He further claimed (and apparently still insists) that volun-

teering for a job rather than acting under orders, may of itself entitle a crew member to a salvage award.

Appellant's major contention, however, is that Kovell was a crew member of the tug only, and that his pre-existing duty to the tug did not prevent him from acting as a stranger to the barges. All these questions were resolved by the trial court adversely to appellant, and no new issue is presented on appeal. Under these circumstances, the burden upon appellant has been defined as follows by this Court in *The Heranger,* 101 F. (2d) 953, 957 (9 C.C.A.):

> "This Court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law."

Other circuits subscribe to the same rule in the following decisions:

Hodges v. Standard Oil Co., 123 F. (2d) 362, 363 (4 C.C.A.);

Johnson v. Andrus, 119 F. (2d) 287, 288 (2 C.C.A.);

Petterson Lighterage & T. Corp. v. New York Central Ry. Co., 126 F. (2d) 992, 995 (2 C.C.A.).

II.

ONE WHO OWES A DUTY OF CARE CANNOT CLAIM SALVAGE.

In "The Law of Civil Salvage", Kennedy, 3d Ed., the leading work on the subject, are found the following definition and comment:

> "A salvage service * * * may be described * * * as a service which saves or helps to save maritime property * * * when in danger * * * if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty." (p. 2.)
>
> "In accordance with this just principle of rewarding only volunteers as salvors, neither the crew nor the pilot navigating the ship, nor the owner or the crew of the tug towing it under a contract of towage nor the ship's agent are ordinarily held entitled to obtain salvage reward in respect of the services rendered by them in the preservation of the ship herself or of the lives or the cargo which she carries; for all of these persons are under a pre-existing obligation to work in their respective ways for the benefit of the life and property at risk." (p. 30).

Appellant recognizes this distinction at pp. 13-14 of his brief, quoting apropriate language from *The Sabine,* 101 U.S. 384; 25 L. Ed. 982.

The reason for the rule is well expressed by Justice Story of the Supreme Court of the United States in the case of *Hobart v. Drogan,* (10 Pet. 108; 9 L. Ed 363), quoting in part from *The Neptune,* (1 Hagg. Adm. R. 236-237):

> " 'What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful services, and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.' And it must be admitted that, however harsh the rule may seem to be in its actual

application to particular cases, it is well founded in public policy, and strikes at the root of those temptations which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship which they are bound to navigate.''

Further recognition of the rule is found in the following language from *The John Perkins,* (Fed. Cas. No. 7360):

> ''* * * if the crew, or individuals of them, may become salvors, the owners, as in this case, may have no protection arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim * * *'' (p. 705.)

It is not denied that the facts do credit to the courage of the appellant, but bravery, as a single element, is not sufficient to justify an award of salvage. As stated in *Kidney v. The Ocean Prince,* 38 Fed. 259, 261:

> ''The sense of duty which prompts a sailor to be skillful, daring, and brave, or a passenger to be zealously active in his efforts to rescue his vessel from the perils of the sea, grows out of the reciprocities which substantially inhere in their relations to the ship.''

See also:

Aurora, 73 F. Supp. 607, 1947 A.M.C. 983;

Mary M., 1938 A.M.C. 1237 (D.C. N.D. Calif.; Roche, J.) (No Federal Citation);

Albionic, 58 Times L.R. 154 (1942);

The Macona, 269 Fed. 468.

III.

APPELLANT OWED A DUTY OF CARE TO THE BARGES.

When Kovell was employed by the owner of the three vessels comprising the flotilla, he knew that his job was to assist in the navigation and care of all three. If this man is entitled to salvage, then, in the words of *The John Perkins* (supra), the owners "may have no protection arising from the presence of those to whose charge they committed their property, since these are the very persons setting up the hostile claim".

Can it be denied that appellant was "one of those to whose charge" the Portland Tug and Barge Co. committed these barges?

The attempted distinction between tug and barges is meaningless. It is similar to, but weaker than the distinction attempted in

The Eastern Shore, 15 F. (2d) 82

where a crew owed a duty to a ferryboat company to care for and operate two vessels, alternately. A crew member who was signed on vessel A for the next day's trip, voluntarily assisted in putting out a fire on vessel B. The Court, in denying salvage because of an existing duty, said (p. 83):

> "But I do not think that it can be said that this crew was specifically attached or exclusively attached to either vessel. Manifestly they were there to be used on both vessels, as the occasion might require."

It is equally manifest that Kovell and his fellow crewmen were there to be used on the tug or the barges, as the occasion might require.

All the witnesses, save only appellant himself, either affirmed or reluctantly recognized the existence of a duty or relationship to the barges, covering the services performed.

McAdams (Apos. 49):

"A. Well, the duty is to protect your tow and towboat at all times. At least, that has been the practice on all the vessels that I have ever sailed on. I might add that Capt. Sullivan's orders were carried out as near as humanly possible from the time the barges were adrift until we retrieved them—by every member of the crew.

Q. Were you or were you not acting in the course of your regular duty as a member of the crew of the tug *Mundos* when you manned the lifeboat and went alongside the barge?

A. Yes, I was acting in the course of duty. I might say we went through the same procedure in February 1947 where we lost our tow off the coast of Mexico and all of the members of the crew helped to retrieve the barges as on this occasion, but one barge sank."

Sullivan (Apos. 145):

"Q. Captain Sullivan, in your opinion were the services performed by these men in the lifeboat within the scope of the duties of the members of your crew?

Mr. Gay. I will object to that question as giving a conclusion on a matter that is at issue.

The Court. Hasn't the libelant testified that it was not?

Mr. Quinby. The libelant has testified that it was not. Certainly Captain Sullivan is better qualified by experience to answer that.

The Court. At least he was captain of the tug at the time. I will overrule the objection.

A. It is the duty of the tug and its crewmen to protect at all times the vessel and its tow because the tow is a part of the vessel in actuality; it is like one vessel; and in case of an emergency it is the duty of the crew to do all in their power to retrieve the barges that were lost, so I would consider that it was part of their duty to go in the lifeboat and retrieve the barges the same as in any other case."

Kobbe (Apos. 67):

"Q. Are you familiar with the duty of a member of a crew of a towing vessel toward its tow at times when the tow is in distress?

* * * * * * *

A. The crew of a tow boat should do everything possible to pick up their own tow, if possible."

Edwards (Apos. 111, under cross-examination):

"Q. There was a time that you felt you should have more compensation for what you did, was there?

* * * * * * *

A. I always felt this way, it is a part of your job; * * *"

Parker (Apos. 34), (when asked if Kovell was acting in the course of his regular duty):

"A. Yes; as I see it, that was his job."

Vittum (Apos. 58):

"Yes, that was his duty."

Regardless of what these men said, or how well they expressed themselves—(Edwards, for example, was un-

duly impressed by the fact that the services were "voluntary")—their failure to claim salvage is the best indication of their true belief. A similar situation arose in

Drevas v. United States, 58 Fed. Supp. 1008, 1011 where the Court, in denying salvage to a single crew member, used the following significant language:

> "No claim for salvage has been made by the master or other members of the crew who participated in taking the ship into port."

It should be remembered that Edwards, Parker, Kobbe, McAdams and Vittum were not, at the time of the trial, employed by the owner of the *Mundos,* and their testimony is presumptively free from bias.

We cannot refrain from comment upon the tactics of appellant in filing his action on behalf of Edwards, McAdams and Kobbe, all of whom categorically denied authorization or knowledge of such action. (Edwards, Apos. 96-97; McAdams, Apos. 50; Kobbe, Apos. 69-70.) Appellant failed to contradict these denials. This device, which obviously was intended to high-pressure his fellow crew members into joining and lending weight to his questionable salvage action, falls short of that high degree of probity required of a libelant before the quasi-equitable bar of admiralty. It casts a shadow upon the conceded gallantry and seamanship displayed by Kovell at the time his service was rendered.

In contrast to all the other witnesses, appellant impelled by self-interest and the direct question of his counsel, testified as follows (Apos. 133):

"Q. Now, Mr. Kovell, in your opinion as a master mariner under these circumstances, were the efforts and the maneuvers that the tugboat and the members of the tugboat went through in order to pick up and save the barges, part of the usual duties of a tugboat?

A. I do not think so; a crew member of a tug is assigned to the tug and is not assigned to the tow."

It is clear, upon the weight of the evidence, that the crew owed a duty to the barges. Such duty does not depend merely upon the testimony of witnesses, but is inherent in the relationship of the crew members to their employer. The tug and barges were entrusted solely to Captain Sullivan and his crew. In effect, the Portland Tug and Barge Company said to these men, "Here is certain property consisting of a tug and two barges, all belonging to your employer. Take this property in your possession. Protect it and care for it during the voyage from San Diego to Seattle. For such service we will pay you wages at a specified rate."

When Kovell and his fellow crew members set out on the voyage, they accepted this understanding, which was implicit in the very nature of the undertaking. There is no contract of towage involved here, as there is in the cases cited by appellant. The only contract in the picture is the implied contract for services between Kovell and his employer. If appellant was a locomotive engineer, he could not deny a duty to the freight cars in his train. As a driver of a truck, Kovell could not, without breach of duty to his employer, drive away and

leave his trailer standing in the road with a broken coupling.

It may be that the duty is so obviously dangerous, under certain circumstances, that non-performance is excused. This fact, however, does not negative the existence of a duty, nor alter the relationship of the employee to the property entrusted to his care.

These barges were what is known as "dumb barges". They had no one aboard, and no means of steering or propulsion. If Kovell, as his counsel now contends, owed his duty solely to the tug, we reach the obviously false conclusion that nobody was taking care of the barges. If they happened to tag along and reach their destination without untoward incident, well and good, but if the tow line broke, and the custodians of the venture refastened it, any one of them could hold a legal gun at the head of the employer and exact tribute. The mere statement of such contention reveals its absurdity.

For all practical purposes, Kovell was a member of the crew of the barges. As stated by Sullivan (Apos. 145) "* * the tow is a part of the vessel, in actuality; it is like one vessel; * *". If appellant wasn't committed to care for the barges, who was? It is repugnant to the dictates of common sense and maritime tradition that any vessel be consciously navigated without human guidance.

IV.

THE SINGLE IDENTITY OF TUG AND DUMB BARGE, JOINTLY OWNED AND OPERATED AS A SINGLE UNIT, IS LEGALLY RECOGNIZED.

In an action for damage to cargo on a barge towed by a tug, the vessels being under common ownership, the combination of tug and tow is considered as one vessel.

> *San Joaquin No. 4-Tennessee (Sacramento Navigation Co. v. Salz),* 273 U.S. 326; 71 L. Ed. 663; 1927 A.M.C. 397, 399:
>
> "The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped on board the barge. But it was to be transported; and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect;—that is, as we understand, a distinct contract implied in fact. But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made, 3 *Williston on Contracts,* Sec. 1293; *Brodie v. Cor-*

poration of Cardiff (1919), A.C. 337, 358; and there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract."

There is no more reason here to conclude that Kovell's contract of employment related solely to the tug than there was in the foregoing case to urge that the contract of carriage applied solely to the barge.

And in *The Columbia,* 73 Fed. 226 (9 C.C.A.), a case requiring the surrender of a jointly owned tug and barge under the Limitation Statute, Judge Ross says (p. 237):

> "When the tug made fast and took in tow the barge, to perform the contract of carriage, the tow became one vessel for the purpose of that voyage—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines."

And in the same case, at p. 238, quoting from *The Northern Belle* (9 Wall. 526, 19 L. Ed. 746), the Court restates the rule in the following language:

> "The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used, though quite often an individual or corporation owning several boats running in a particular trade have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage."

We do not contend that mere joint ownership, standing alone, will defeat the right of salvage on behalf of the crew of one vessel against another, jointly owned but operated on a separate, distinct voyage. Thus in

Jacobson v. Panama R. Co., 266 Fed. 344,

the *Panama* went aground. Later, the *Neptunas* came along and rendered assistance. It is obvious that the crew of the *Neptunas,* in the absence of special contract, owed no duty to the *Panama.* An interesting case sustaining this obvious theory, and containing some facts similar to those now before us, is

The Colima, 6 Fed. Cas. No. 2996.

We have no quarrel with these cases. If the *Mundos* had happened upon another vessel owned by the Portland Tug and Barge Co., engaged upon a separate and distinct voyage, and had rendered assistance to such vessel, we concede that her crew, having no employee relationship to the salved craft, would be entitled to salvage.

In the present case, however, Kovell and the others on the tug had a very clear and definite duty to care for all the property entrusted to their care, including the barges. To give them full credit, they discharged this duty, and did a good job. This job was what they were hired to do, and what they were paid for.

Handling barges in off-shore towage is a hazardous operation. Tow lines often break, and the very thing which happened here must have been within the assumed contemplation of Kovell when he signed on, or even earlier, when he decided to go to sea. While not be-

littling the services rendered by appellant and the remainder of the crew, we consider that his case falls squarely within the following language of the Court in *The Albionic,* 58 Times L. R. 154, 155 (1942):

> "The appellant, and those associated with him, in the events out of which this litigation arises, performed what were obviously very gallant and very efficient services. As the reward for those services, they must be content with the knowledge that they performed their duty in the best traditions of the service to which they belonged. For the circumstances of the case, in my opinion, clearly make it impossible to take the view that, when they performed those services, they had ceased to be bound by their contracts of employment and had become volunteers entitled to be treated as strangers to the ship, and, therefore, entitled to pecuniary remuneration for salvage services."

V.

THE MERE FACT THAT KOVELL VOLUNTEERED DOES NOT ENTITLE HIM TO SALVAGE.

Appellant's brief is replete with statements that Kovell "volunteered" for his service, rather than acting under the specific orders of Captain Sullivan. From this fact, a false inference is drawn which inferentially places Kovell in the category of a "volunteer", or stranger to the venture. As indicated by the facts and language of the following cases, in all of which salvage was denied, this distinction has no effect when, as here, the service is performed in accord with a pre-existing relationship to the imperilled property.

The Lyman Abbott, 66 Fed. Supp. 788; 1946 A.M.C. 759.

Part of crew, in response to a request for volunteers, went back on their ship, which was loaded with explosives and under air attack.

> "(Fed. Supp. p. 797) Nor is the libellants' cause strengthened by the contention that the men were asked to volunteer rather than ordered to return. As to the first group who accompanied Dahlstrom at 2:00 A.M., it must be clear that he was constrained not to put any one under the necessity for refusing to obey and to follow him into a position of obvious peril, and therefore he made the request which four of those under him honored."

The Comet, 205 Fed. 991.

Members of crew rowed forty miles to obtain help for disabled vessel, then libelled for salvage, alleging "extra hazardous services performed by libelants outside the scope of their employment."

> (p. 993) "The mere fact that the master called for volunteers to secure assistance and libelants answered the call would not effect their discharge, entitling them to salvage."

The Portreath, XVI Aspinall's Maritime Cases 227.

Crew members returned to vessel in danger of sinking after collision.

> (p. 229) "The fact that the master called for volunteers instead of ordering the crew to go back appears to me to have no bearing on the case."

Elrod v. Luckenbach S. S. Co., 62 Fed. Supp. 935, 1945 A.M.C. 1100.

In order to save his stranded vessel, the master (p. 937) "* * * asked for volunteers, every member of the crew responded, and four were selected * * *."

Drevas v. United States, 58 Fed. Supp. 1008, 1945 A.M.C. 254.

Crew members returned to torpedoed vessel, in danger of sinking.

> (p. 1011) "Attention is called to the fact that they volunteered for the service and were not ordered by the master to undertake it. The evident reason why the master did not give an order was the then uncertainty as to the continued safety of the ship."

VI.

TOWAGE CONTRACT CASES ARE NOT IN POINT.

The authorities cited by appellant in his brief (pp. 18-20) establish merely that a tug-owner, contracting at arm's length with the owner of a towed vessel, may receive an award over and above the contract price, for services in excess of those contemplated by the contract. In those cases the towed vessel was fully manned, and her owner was dealing with the owner of the tug.

The issue here is not between tug and tow, but between the employee on the one hand, and the owner on the other, of both tug and tow. Here, there was no towage contract between the vessels—there couldn't be, since they had a single owner and operator. Kovell, as serv-

ant of the owner, and custodian of both tug and tow, can have no benefit from any assumed, imaginary contract between the vessels.

The only contract before the Court is the contract of employment between appellant and his employer, and the only question arising under that contract is this: At the time his services were rendered, was Kovell one of the custodians of the barges, owing his employer a duty to care for them?

The trial Court, after full hearing and upon ample evidence, answered this question in the affirmative.

VII.

CONCLUSION.

From the viewpoint of the amount of any potential award, this case is unimportant. The barges were ultimately towed into port by the combined efforts of three valuable tugs and their crews. Even if appellant had been a stranger to the venture, his share of any reasonable salvage award would probably fall short of the cost of defending the present action.

In principle, however, the case is vital to the shipping industry. If a crew member is held entitled to salvage under the facts here presented, tug owners face an intolerable situation. They cannot estimate their cost of operation, since crews will no longer be working for wages, but for wages plus a potential undetermined share of the property towed. In effect, a crew member would be

offered a title interest in property entrusted to him, as an incentive to insure his best efforts to complete the voyage.

It is the magnitude of this danger, rather than the complexity of the issue, which has led us to treat the matter at some length.

The essential question here is quite simple. A person owing a duty of care to property, or having any similar relationship to it, cannot claim salvage for services rendered to such property. Kovell assumed such duty, and entered into such relationship, when he agreed with his employer to care for the *Mundos* and the barges on the voyage. This agreement was just as binding as if the property involved had been one vessel, instead of three. The services he rendered were part of his recognized duty to his employer and to the property entrusted to him. For such services, no matter how meritorious, he is not entitled to salvage.

The decree of the District Court should be affirmed.

Dated, San Francisco, California,
November 1, 1948.

Respectfully submitted,
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